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No. 94-1057

Supreme Court, U.S.
FILED
FEB 17 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

BOBBY HAZEL AND HOMER L. RICHARDS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Lorton Reformatory in Lorton, Virginia, is within the special maritime and territorial jurisdiction of the United States.

2. Whether a government witness's statement that one petitioner had sexually assaulted the witness required a mistrial, where the district court sustained an objection and instructed the jury to disregard the statement.

3. Whether petitioners were entitled to a new trial based on new evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 33 F.3d 53 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1994. The petition for a writ of certiorari was filed on November 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Hazel and Richards were convicted of first-degree and

second-degree murder, respectively, both in violation of 18 U.S.C. 1111. Both were also convicted of possession of a dangerous weapon, in violation of Virginia law and the Assimilative Crimes Act, 18 U.S.C. 13. Hazel was sentenced to life imprisonment, and Richards was sentenced to 235 months' imprisonment. The court of appeals affirmed. Pet. App. 3a.

1. In June, 1992, petitioners were inmates at Lorton Reformatory, which is located on federally owned land in the State of Virginia. Pet. App. 3a-4a. The evidence at trial established that petitioners stabbed and killed a third inmate, Gregory Ford, outside the room of a fourth, David Basknight. Travis Cameron testified that he saw petitioners stab Ford. Basknight testified that he heard an argument outside his room, heard Ford fall, and found him bleeding on the floor. Marshall Hollingsworth testified that as he came up some nearby stairs he saw petitioners make aggressive hand motions toward Ford; he retreated down the stairs and then returned, passing petitioners as they left down the stairs, and found Basknight standing over Ford's body. Thomas Dinsmore testified that petitioner Richards told him that Ford owed Richards money, and that petitioners had earlier asked him to "hurt" Ford as payment for a debt that Dinsmore owed primarily to petitioner Richards. *Ibid.*

On cross-examination, Cameron admitted that he did not like petitioner Hazel, and that he had previously told petitioners' counsel that he wanted to "kill" Hazel. Pet. App. 4a; Pet. 31. On redirect the government asked Cameron why he had those feelings, and Cameron replied that Hazel had sexually assaulted him. The district court sustained an immediate objection to the question, and directed the jury to disregard it. Pet. App. 4a; Pet. 32. In response to post-trial motions for a new trial based in part on alleged prejudice resulting from the

question and answer, the court held that in retrospect the government's inquiry was proper in light of the preceding cross-examination concerning the witness's bias, and that in any event petitioners were not prejudiced by any error. Pet. App. 4a.

Petitioners also based their request for a new trial on a claim of newly discovered evidence. Pet. App. 6a. In support, they produced statements from five Lorton inmates. One stated that Ford had assaulted Basknight on the day before Ford's death, and that the two had argued again on the day of the murder; that he had seen Cameron retrieve a "shank," or homemade knife, from a room; and that he later saw Cameron running away with a bloody knife while Ford lay on the floor. *Id.* at 6a-7a. Another stated that he saw Cameron pull Ford's body from Basknight's room to a common area of the dorm, and that Cameron's shirt was spattered with blood. Two more claimed that Basknight had stated to each of them that he was a defendant in the murder trial, that he killed Ford, and that he had been acquitted for lack of evidence. The last inmate stated that he saw Cameron attack someone in the hallway and back him into Basknight's room. Two of the new "witnesses" admitted that before trial they had told the FBI that they had no information about the murder; a third made a similar pre-trial statement to Hazel's lawyer. *Id.* at 7a. Observing that the case was "not * * * close" and that retrial with the new evidence "would not probably produce a different result," the district court denied the motion for a new trial. *Id.* at 8a.

2. The court of appeals affirmed. Pet. App. 1a-8a. Relying on a prior decision, the court held that the federal murder charge was proper because Lorton Reformatory is within the special maritime and territorial jurisdiction of the United States, and that the

district court properly took judicial notice of that fact. *Id.* at 5a-6a.

The court also held that the government's question about the reason for Cameron's bias against Hazel, and Cameron's answer that Hazel had sexually assaulted him, were "entirely appropriate" responses to the extensive probing of Cameron's bias on cross-examination. Pet. App. 4a-5a. In any event, the court held that even if the government's question was improper, under the circumstances "any error was undoubtedly harmless." *Id.* at 5a.

Finally, the court held that the district court did not abuse its discretion by denying petitioners' motion for a new trial on the basis of their belated evidentiary submissions. Pet. App. 6a-8a. The court explained that to obtain a new trial, a defendant must show that (1) the evidence was newly discovered, (2) he exercised due diligence in discovering the evidence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material, and (5) the evidence would probably result in an acquittal at a new trial. *Id.* at 6a. Applying that test, the court concluded that even if the affidavits submitted by petitioners were new and material and could not have been discovered earlier through due diligence, the evidence was "merely additional impeachment of the testimony of Basknight, Cameron, and Hollingsworth." *Id.* at 7a. In addition, based on its review of the record, the court of appeals agreed with the trial court that the evidence "would not probably result in acquittal" at a new trial. *Id.* at 7a-8a.

ARGUMENT

1. Petitioners contend (Pet. 14-28) that the district court lacked jurisdiction over the federal murder charges because the Lorton Reformatory (Lorton) is not

located "[w]ithin the special * * * territorial jurisdiction of the United States." 18 U.S.C. 1111(b). Under 18 U.S.C. 7(3), that jurisdiction includes:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

The language of Section 7(3) echoes that of Article I, Section 8, Clause 17 of the Constitution, which authorizes Congress to exercise "exclusive Legislation in all Cases whatsoever" over the District of Columbia, and

> to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

See *Bowen* v. *Johnston*, 306 U.S. 19, 22 (1939).

In 1909, Congress authorized and directed the Commissioners for the District of Columbia to purchase land in either Maryland or Virginia for the construction of a prison. Act of March 3, 1909, ch. 250, 35 Stat. 717; see also Act of August 5, 1909, ch. 7, 36 Stat. 122 (amending original act to require that title be taken in the name of the United States). The United States acquired the land comprising the entire Lorton complex (including the reformatory, the original Occoquan workhouse, and a variety of other facilities) by purchase or condemnation between 1910 and 1953. See *Transfer of Lorton Reformatory to the District of Columbia: Hearings on*

S. 1243 Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary (hereinafter *Lorton Hearings*), 94th Cong., 1st Sess., 92-95 (1975) (District of Columbia Position Paper, Appendix VIII). The United States retains title to the land, but Congress has granted managerial control over the reformatory to the government of the District of Columbia. See generally *Cannon* v. *United States*, 645 F.2d 1128, 1135-1137 (D.C. Cir. 1981) (discussing relationship between the United States and the District of Columbia with respect to Lorton).

Petitioners argue (Pet. 15) that Lorton is not within the special territorial jurisdiction of the United States because it is managed and controlled by the District of Columbia. Section 7(3) does not require federal management, however; rather, it includes within federal jurisdiction lands "acquired" for the "use" of the United States or for the erection of public buildings. The United States acquired and maintains title to the land on which the reformatory is located, and it is to the United States that the State of Virginia has ceded exclusive or concurrent jurisdiction.[1] The District of Columbia is an

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[1] Under Section 7(3), land acquired for federal use generally lies within the special territorial jurisdiction of the United States either if it is acquired with the consent of the relevant State, or if the United States otherwise exercises "exclusive or concurrent jurisdiction" over it. The bulk of the land at Lorton (approximately 2,500 out of 3,000 acres) was acquired in the first two transactions, in 1910 and 1913. *Lorton Hearings*, pp. 5-6, *supra*, at 92-93. With respect to those tracts, Virginia law explicitly consented to acquisitions by the United States for public purposes, and ceded exclusive or concurrent jurisdiction over lands so acquired. See 1901-1902 Va. Acts 565-566; 1912 Va. Acts 563 (limiting consent); Va. Code § 19 (1919) (consenting and ceding jurisdiction with respect to "any land acquired, or to be acquired"

area of special constitutional status over which Congress exercises "exclusive Legislation," under the same provision of the Constitution that confers on Congress "like Authority" over the federal installations described in that provision and in the second clause of Section 7(3). U.S. Const. Art. 1, § 8, Cl. 17. Congress has, by statute, created a local governmental structure for the District, and delegated to it various powers; but that government exercises control over Lorton at Congress's discretion, and under overall federal jurisdiction. Congress retains ultimate and plenary constitutional power over the District's government and all its functions. See generally *Palmore* v. *United States*, 411 U.S. 389, 397-398 (1973); *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 104-110 (1953).

Petitioners' reliance (Pet. 24-25) on *Johnson* v. *United States*, 225 U.S. 405 (1912), is misplaced. In *Johnson*, the Court held that a previous version of 18 U.S.C. 7(3) did not apply to the territory of the District of Columbia

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by the United States for public buildings). See also *Board of Supervisors* v. *United States*, 408 F. Supp. 556, 564 n.10 (E.D. Va. 1976), appeal dismissed, 551 F.2d 305 (4th Cir. 1977) (Table). Present state law is similar. See Va. Code Ann. §§ 7.1-18.1 (Michie 1993) (applicable after June 30, 1981). For some years after 1936, however, the state consent and cession laws were limited in such a way that they may not have applied to the acquisition of the final 423 acres of the present Lorton property. See 1936 Va. Acts 610-611; 1940 Va. Acts 754-755; see also 40 U.S.C. 255. Petitioners do not argue, however, that the murder at issue in this case took place on that portion of the property. Cf. *Lorton Hearings*, pp. 5-6, *supra*, at 92-95 (characterizing only 1.5 acres of the post-1936 acquisitions as "reformatory" property). Both the question presented (Pet. i) and the text of the petition (Pet. 14-28) present only petitioners' argument that the entire reformatory falls outside federal jurisdiction because, and to the extent that, it is managed by the District of Columbia.

itself, because the statutory reference to "acquired" lands "has a proprietary and not a governmental sense, and is very inapt, indeed, to describe the District of Columbia." 225 U.S. at 415. The land on which Lorton is located lies, however, within the boundaries of Virginia, and not within the District of Columbia; and it was "acquired" by the federal government through purchase or condemnation, not through special cession by the State. *Johnson* is therefore inapposite here.

Petitioners also rely (Pet. 23-24) on *Cannon* v. *United States*, *supra*, and *United States* v. *Gibson*, 880 F.2d 795 (4th Cir. 1989). *Cannon*, however, held only that Lorton was not a "federal agency" for purposes of liability under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*—in part because, under the federal statutory scheme for local government of the District, the District and its employees have operational responsibility for the prison, and do not share the federal government's general sovereign immunity from tort liability. See 645 F.2d at 1133 n.15, 1135-1137. In *Gibson*, the court held that Lorton is not a "[f]ederal * * * facility" for purposes of 18 U.S.C. 1791, which bars the possession of contraband in federal prisons. 880 F.2d at 797. Both cases turn on the relationship between the "home rule" structure that Congress has chosen for the District and the operation of particular federal statutes; neither deals with the sort of fundamental, territorial jurisdictional issue addressed by 18 U.S.C. 7(3).[2] With respect to that issue petitioners point to no conflict among the courts of appeals, and suggest no persuasive reason for questioning the conclusion of the courts below.

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[2] Any conflict between this case and *Gibson* would, in any event, be a matter for internal resolution by the court of appeals. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

2. Petitioners argue (Pet. 28-50) that the district court was required to grant their motion for a mistrial because of Travis Cameron's testimony, on redirect examination, that the reason he said he wanted to kill petitioner Hazel was that Hazel had sexually assaulted him. But that remark was never admitted into evidence. To the contrary, the judge sustained petitioners' immediate objection, and promptly instructed the jury to disregard the question and answer because they had "nothing to do with this case." Pet. 31-32. Petitioners suggest no reason for abandoning in this case "the almost invariable assumption of the law that jurors follow their instructions." *Shannon* v. *United States*, 114 S. Ct. 2419, 2427 (1994) (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987)).

Moreover, as both courts below ultimately recognized (see Pet. App. 4a), the district court should not have excluded the question and answer in the first place. When the defense attempts to show that a witness is biased against the defendant, the government is generally entitled to elicit the witness's explanation of the reasons for his apparent bias, even if it refers to the defendant's other crimes. See *United States* v. *Kimbrough*, 528 F.2d 1242, 1248-1249 (7th Cir. 1976) (government witness permitted to refer to defendant's other crime to rebut contention that he was "out to get" the defendant). Because petitioners sought to establish Cameron's bias by eliciting Cameron's previous comment to petitioners' counsel that he would like to "[k]ill" Hazel, it was "entirely appropriate" (Pet. App. 5a) for the prosecutor to put that remark in context by asking Cameron to explain the source of his enmity.[3]

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[3] Petitioners' argument that evidence of the sexual assault on Cameron was not admissible under Federal Rule of Evidence

Finally, both the trial court and the court of appeals agreed that Cameron's passing reference to the prior sexual assault, immediately counterbalanced by the instruction to disregard it, caused "no prejudice" and was "undoubtedly harmless." Pet. App. 4a-5a. There is no reason to question that conclusion.

3. Petitioners contend (Pet. 50-65) that the district court should have granted their motion for a new trial based on newly discovered evidence. A defendant is entitled to a new trial on that basis only if he can show that the evidence is newly discovered, that it could not have been obtained earlier through due diligence, that it is material (not merely impeaching or cumulative), and that it would probably result in an acquittal on retrial. Pet. App. 6a; see also, *e.g.*, *United States* v. *Walker*, 25 F.3d 540, 548 (7th Cir.), cert. denied, 115 S. Ct. 531 (1994); *United States* v. *Braggs*, 23 F.3d 1047, 1050 (6th Cir.), cert. denied, 115 S. Ct. 274 (1994); *United States* v. *Reed*, 887 F.2d 1398, 1404 (11th Cir. 1989), cert. denied, 493 U.S. 1080 (1990); *United States* v. *Kelly*, 790 F.2d 130, 133 (D.C. Cir. 1986); *United States* v. *Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.), cert. denied, 113 S. Ct. 258 (1992). The court below concluded correctly that petitioners could not meet that test. Even assuming that the proffered evidence was new and material and should not have been discovered earlier, the court of appeals held that it amounted to no more than "additional

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404(b) is beside the point. Evidence that is admissible for one purpose may not be excluded entirely because it would be inadmissible if offered for some other purpose. *United States* v. *Abel*, 469 U.S. 45, 56 (1984). Cameron's testimony about Hazel's alleged sexual assault was offered to decribe the context of, or offer an explanation for, the witness's prior comment to petitioners' counsel, not to show motive, opportunity, intent, or any other attribute of the defendant under Rule 404(b).

impeachment" of the testimony of the government's witnesses. Pet. App. 7a. That fact-bound issue does not warrant further review.

Both courts below also held that petitioners were not entitled to a new trial because the new proceeding "would not probably produce a different result." Pet. App. 8a. Petitioners argue (Pet. 58-64) that in other circuits they could have obtained a new trial by showing only that a jury considering their new evidence "might have" acquitted them. Pet. 59. Even the test petitioners advocate, however, applies only if the trial court is "reasonably well satisfied that the testimony given by a material witness is false." *Id.* at 58-59 (citing *Larrison* v. *United States*, 24 F.2d 82 (7th Cir. 1928)). Petitioners offer no indication that either of the courts below believed that a material witness had testified falsely. Nor is there any indication that application of the "might have" standard would have assisted petitioners: both courts agreed that this "was not a close case." Pet. App. 8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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